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Citizenship and Immigration Services

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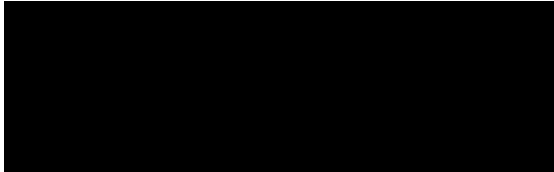
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ADMINISTRATIVE APPEALS OFFICE

CIS, AAO, 20 Mass, Rm 3042

425 I Street, N.W.

Washington, DC 20536

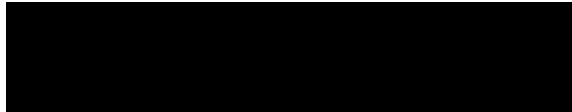


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Office: CALIFORNIA SERVICE CENTER Date:

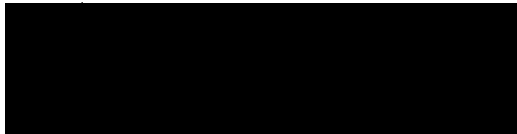
FEB 10 2004

IN RE: Petitioner:
Beneficiary:



Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a landscaping firm. It seeks to employ the beneficiary permanently in the United States as a landscape gardener. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. The petition's priority date in this instance is December 18, 1997. The beneficiary's salary as stated on the labor certification is \$10.42 per hour or \$21,673.60 per year.

Counsel initially submitted, with the Immigrant Petition for Alien Worker (I-140), insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated

February 27, 2002, the director required additional evidence to establish the petitioner's ability to pay the proffered wage. The RFE specified the petitioner's last eight (8) quarterly wage reports (Form DE-6) with names, social security numbers, and weeks worked for all employees. Also, the RFE requested statements of business bank accounts for the last 12 months and letters from all banks listing when the account was opened, current status, and average balance.

The petitioner already had submitted Form 1040, U.S. Individual Income Tax Return, for 1997-2000 and bank statements for 2001. Form 1040 reported adjusted gross income (AGI) in the respective years of \$16,706, \$16,779, \$17,157, and \$17,325. Schedules C reflected no cost of labor except \$1,880 in 1999. Counsel estimated the balances of bank statements at \$911.45. The petitioner's adjusted gross income for 1997-2000 and its bank balances were all less than the proffered wage.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition.

On appeal, counsel's concedes that the AGI is less than the proffered wage, and asserts the following:

Although this conclusion is accurate, it does not reflect the financial position of [the petitioner]. A more accurate determination of the [petitioner's] ability to pay the proffered wage can be made by examining the gross income of the [petitioner].

Counsel offers no authority for the proposition that gross income must be considered without reference to the expenses incurred to generate it. On the contrary, in determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS), formerly the Service or INS, will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd.*, 703 F.2d 571 (7th Cir. 1983).

In *K.C.P. Food Co., Inc. v. Sava*, the court held that CIS had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F.Supp. at 1084. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See also *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. at 1054.

Counsel further remonstrates that CIS must consider the tax return in its entirety, but specifies no error affecting the outcome. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Even though the petitioner submitted bank statements to demonstrate that it had sufficient cash flow to pay the proffered wage, there is no proof that they somehow represent additional funds beyond those of the tax returns. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

After a review of the federal tax returns, brief, and bank statements, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.